

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF TRIPCOVICI v. MONTENEGRO

(Application no. 80104/13)

JUDGMENT

STRASBOURG

7 November 2017

FINAL

07/02/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Tripcovici v. Montenegro,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Işıl Karakaş, *President,*
Nebojša Vučinić,
Paul Lemmens,
Valeriu Griţco,
Ksenija Turković,
Stéphanie Mourou-Vikström,
Georges Ravarani, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 10 October 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 80104/13) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Dan Laurentiu Tripcovici ("the first applicant") and his mother, Mrs Armenuhi Tripcovici ("the second applicant"), both with dual Romanian and Italian nationality, on 8 July 2012.

2. The applicants were represented by Ms D.R. Debrezeni, a lawyer practising in Bucharest, Romania. The Montenegrin Government ("the Government") were represented by their Agent, Mrs V. Pavličić.

3. The applicants complained about the arbitrariness of the relevant court's judgment. They also alleged that they had not had access to court and complained about an interference with their property rights.

4. On 17 December 2015 the above complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Given that the applicants sent in their observations outside the set time-limit, the President of the Section decided, pursuant to Rule 38 § 1 of the Rules of Court, not to admit the belated observations to the file.

6. Notified under Article 36 § 1 of the Convention and Rule 44 § 1 (a) of their right to intervene in the present case, the Italian Government and the Romanian Government did not state any wish to do so.

7. On an unspecified date after 17 December 2015 the second applicant died. On 22 February 2016 the first applicant informed the Court that, as her son, he was "to succeed her in every respect".

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1949 and 1923 respectively and lived in Bucharest, where the first applicant still lives.

9. The applicants were co-owners of two adjacent plots of land in Montenegro.

10. On 13 June 2009, during a visit to the plots, the first applicant noticed a metal fence built partly on their property. The fence divided the two plots of land and made it impossible for them to access one plot from the other. It appears that the fence had been erected some time in February 2009.

11. On 15 July 2009 the applicants, who had legal representation, instituted civil proceedings for trespass (*radi smetanja posjeda*) against B.Ć., their neighbour.

12. On 27 June 2011 the Court of First Instance (*Osnovni sud*) in Kotor ruled in favour of the applicants and ordered B.Ć. to remove the fence and pay the applicants 1,435 euros (EUR) in respect of legal costs. The court was satisfied that the applicants had lodged their claim in time, given that the deadline for initiating proceedings was 30 days from the day on which they had noticed the trespass, taking into account that 13 and 14 July were national holidays. In doing so the court relied on section 77 of Property Act (see paragraph 14 below).

13. On 20 December 2011 the High Court (*Viši sud*) in Podgorica, ruling on an appeal lodged by B.Ć., quashed the previous judgment and rejected the applicants' claim (*tužba se odbacuje*) as submitted out of time. The court held that 13 and 14 July were indeed national holidays when the courts did not sit. It considered, however, that the 30-day period within which the applicants could institute proceedings was mandatory "[in which case] there could be no shifting of the time-limit when its last day fell on a day when the courts [did] not sit". The time-limit had therefore expired on 13 July 2009, and the applicants had not filed their claim until 15 July 2009.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Property Act 1980 (*Zakon o osnovama svojinsko-pravnih odnosa*; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 6/1980 and 36/1990, and the Official Gazette of Federal Republic of Yugoslavia no. 29/1996)

14. Section 77 provided that an action for trespass (*spor zbog smetanja državine*) should be lodged within 30 days of the date on which the trespass and the trespasser became known, and in any event within a year.

B. Property Act 2009 (*Zakon o svojinsko-pravnim odnosima*; published in the Official Gazette of Montenegro - OGM - no. 019/09)

15. Section 126 provides that if a third party (*treće lice*) disturbs the owner of a certain property without justification – not by taking the property away but in some other manner – the owner can bring an action and seek cessation of the disturbance. Pursuant to section 129 the right to bring this action does not become time-barred.

16. Section 404 § 1 has the same wording as section 77 of the previous Act.

17. Section 422 provides that all proceedings initiated before the Act entered into force must be terminated pursuant to the provisions which were in force at the time when the proceedings began, unless differently provided by the Act.

18. The 2009 Act entered into force on 21 March 2009 and thereby repealed the previous Act.

C. Civil Procedure Act (*Zakon o parničnom postupku*; published in the Official Gazette of the Republic of Montenegro nos. 22/04, 28/05 and 76/06, and the OGM no. 73/10)

19. Section 108 provides that time-limits are calculated in days, months and years. If the time-limit is to be counted in days, the period starts running not on the day when the impugned event occurs but on the next day. It also provides that if the last day of the time-limit falls on a national holiday or a Sunday or some other day when the courts do not work, the time-limit expires on the first working day thereafter.

20. Section 109 (1) provides that when a submission has to be lodged by a certain deadline (*vezan za rok*) it is to be considered as submitted in time if it was lodged with a competent court before the relevant time-limit expired.

21. Sections 112 and 113, taken together, set out the conditions for procedural reinstatement (*povraćaj u pređašnje stanje*). In particular, if a party to the proceedings failed to meet the deadline to undertake a certain action in the proceedings and therefore lost the right thereto, the court must allow that party, at his/her own request, to undertake that action at a later date (*naknadno*) if it considers that there were justifiable reasons for the failure to act which could not have been foreseen or avoided.

22. Section 421 sets out the details as to when proceedings can be reopened (*ponavljanje postupka*).

23. Section 440 provides that the courts will always pay particular attention to the need to resolve trespass claims as a matter of urgency, depending on the nature of each case.

24. Section 443 provides that no appeal on points of law is allowed against civil courts' decisions on trespass.

D. Relevant domestic case-law

25. On 21 April 2015 the High Court in Podgorica (Gž. br. 4622/14) upheld a decision of the Court of First Instance (P. br. 2266/13) which found that an appellant's employment-related claim – which had been filed one day after the Easter holidays – had been filed belatedly, since the fifteen-day time-limit had expired on the preceding Saturday, regardless of the fact that Saturday was a non-working day for the courts.

26. On 20 October 2015 the Court of First Instance in Berane (P. br. 1348/15) rejected as belated an appellant's claim which had been filed nine days after the expiration of the 30-day statutory time-limit. On 10 February 2016 the High Court in Bijelo Polje upheld this decision (Gž. br. 145/16).

THE LAW

I. PRELIMINARY ISSUE

27. The Court notes that on an unspecified date after 17 December 2015 the second applicant died and that the first applicant informed the Court that that he was to succeed her in every respect (see paragraph 7 above). The Court considers this as a statement of the first applicant's wish to pursue the proceedings before the Court in his mother's stead.

28. The Court reiterates that in a number of cases in which an applicant has died in the course of the proceedings, it has taken into account statements by the applicant's heirs or by close family members expressing

their wish to pursue the proceedings before the Court (see *Karner v. Austria*, no. 40016/98, § 22, ECHR 2003-IX, with further references).

29. In the circumstances of the present case, the Court finds that the first applicant has standing to proceed in the second applicant's stead (see, *mutatis mutandis*, *Göktaş v. Turkey*, no. 66446/01, § 19, 29 November 2007). For reasons of convenience, however, the Court will continue to refer to the first and second applicants together as "the applicants" even though it is now the second applicant's son who has assumed that status.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS TO THE FAIRNESS OF THE PROCEEDINGS

30. The applicants complained under Article 6 of the Convention that the judgment of the High Court had been arbitrary in view of its lack of reasoning as to why section 108 of the Civil Proceedings Act was not applicable in their case. The relevant Article reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

31. The Government contested the applicants' complaints.

A. Admissibility

32. The Government submitted that the applicants had failed to exhaust all available domestic remedies, in particular to request a procedural reinstatement and reopening of the proceedings pursuant to sections 112, 113 and 421 of the Civil Procedure Act (see paragraphs 21-22 above).

33. The applicants did not reply on time to this objection (see paragraph 5 above).

34. The relevant principles with regard to the exhaustion of domestic remedies are set out in detail in *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014.

35. The Court notes, in particular, that the mere existence of doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Akdivar and Others v. Turkey*, no. 21893/93, § 71, *Reports of Judgments and Decisions* 1996-IV, and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 70, 17 September 2009). However, to be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

36. Turning to the present case, the Court notes that a request for procedural reinstatement is provided only in cases where a certain deadline

has not been met for a justifiable reason which could not have been foreseen or avoided (see paragraph 21 above), which was not the situation in the applicants' case. There was no reason which could not have been foreseen or avoided on the basis of which the applicants could reasonably have been expected to file a request for procedural reinstatement and be successful. The Court therefore considers that in the circumstances of the present case the said request could not be considered an effective domestic remedy and the Government's objection in this regard must be dismissed.

37. The Court has already held that a request for the reopening of proceedings which have already been concluded on the basis of a final court decision cannot usually be considered an effective remedy within the meaning of Article 35 § 1 of the Convention (see *Josseline Riedl-Riedenstein and Others v. Germany* (dec.), no. 48662/99, 22 January 2002). The situation may be different if it can be established that under domestic law such a request can genuinely be deemed an effective remedy (see *K.S. and K.S. AG v. Switzerland*, no. 19117/91, Commission decision of 12 January 1994). However, the Government have submitted no case-law to that effect. Their objection in this regard must therefore be dismissed even assuming that the remedy in question was available (see *Barać and Others v. Montenegro*, no. 47974/06, § 28, 13 December 2011).

38. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

39. The applicants complained that the High Court's decision was arbitrary because of an alleged lack of reasoning as to why section 108 of Civil Procedure Act was not applicable in their case.

40. The Government contested the applicants' complaint. They submitted, in particular, that the High Court's decision was in accordance with section 108 of the Civil Procedure Act. They further maintained that proceedings for trespass were urgent by nature and specific in that the respective time-limits were mandatory, meaning that they could not be extended. Accordingly, if the time-limit was due to expire on a national holiday or on a Sunday, in practice it expired on the last working day prior to that. This was in accordance with the Civil Procedure Act, in particular section 109 thereof. The Government contended that this was the standard interpretation by the domestic courts of the relevant statutory provision, in support of which they enclosed two other domestic judgments (see paragraphs 25-26 above). In the applicants' case, the time-limit had

therefore expired on 12 July 2011 and the claim had not been filed until 15 July 2011, therefore belatedly.

41. The Government also maintained that it was not the Court's task to consider how domestic courts interpreted and applied the national law, and concluded that there had been no violation of Article 6 of the Convention.

2. The Court's conclusion

42. The Court reiterates that judgments of courts and tribunals should adequately state the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). It is also primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic law. Unless the interpretation is arbitrary or manifestly unreasonable the Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 86, ECHR 2007-I (albeit in context of Article 1 of Protocol No. 1); and *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 83-84, 11 July 2017).

43. Turning to the present case, the Court notes that the first applicant had noticed the impugned trespass on 13 June 2009. The applicants were entitled to institute proceedings for trespass within a period of 30 days, the last day of which in their case fell on a national holiday. The applicants lodged their claim on 15 July 2009, which was the first working day after the holiday. The Court of First Instance was satisfied that the claim was lodged in time. Contradicting this view, the High Court considered that the respective time-limit was mandatory, meaning that it could not be extended, and rejected the applicants' claim as belated. In doing so, however, the High Court failed to rely on any statutory provision in support of its conclusion or any domestic case-law to that effect.

44. The Court further notes that, in justifying the High Court's conclusion in their observations, the Government submitted that the impugned decision was in accordance with section 108 (see paragraphs 40, 19 and 13 above, in that order). They also relied on section 109 of the Civil Procedure Act and submitted two domestic decisions in addition.

45. The Court observes that section 109 provides that when a submission has to be lodged by a certain deadline it is to be considered as submitted in time if it was lodged with a competent court before the relevant time-limit expired. It is section 108, however, which regulates when exactly time-limits expire, including when the last day thereof falls on a holiday or some other non-working day. Neither section 109 nor any other provision for that matter provides for any alternative method of calculating time-limits

as an exception to section 108. Moreover, the domestic case-law submitted by the Government either did not relate to trespass claims or did not relate to situations where time-limits ended on non-working days (see paragraphs 25-26 above), and in both cases decisions were issued years after the High Court had ruled in the applicants' case.

46. The Court reiterates that in principle it is not its role to question the national courts' interpretation of domestic law (see, for example, *Ādamsons v. Latvia*, no. 3669/03, § 118, 24 June 2008), or to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz*, cited above, § 28). Unless the interpretation of domestic law is arbitrary or manifestly unreasonable the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see paragraph 42 above). However, in the present case the Court considers that section 108 of the Civil Procedure Act provided in most clear terms that the time-limit for filing a claim expired on the first working day after the national holiday. There is nothing in the decision of the High Court or in the observations of the Government that would justify why this rule, which was drafted in general terms and which was not contradicted by any relevant case law, should not be applicable. In particular, the High Court did not cite any provision whatsoever or any relevant domestic case-law, or even any reason, in order to explain why section 108 was not applicable. The Court therefore considers that the High Court's decision to declare the applicants' claim out of time was manifestly unreasonable.

47. In view of the above, the Court considers that the applicants did not have a fair hearing and finds accordingly that there has been a violation of Article 6 § 1 of the Convention.

III. OTHER COMPLAINTS

48. The applicants complained that they had been unlawfully denied access to court and that the rejection of their claim for trespass had interfered with their property rights. They belatedly submitted comments, which, for that reason, were not admitted to the case file. They relied on Article 6 of the Convention, and Article 1 of Protocol No 1, respectively, the latter of which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in

accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

49. The Government contested the applicants' complaints. They submitted, in particular, that the applicants could still initiate proceedings for the protection of their property pursuant to section 126 of Property Act 2009 (see paragraph 15 above) if they wished.

50. The relevant principles concerning the exhaustion of domestic remedies are set out in *Vučković and Others*, cited above, §§ 69-77.

51. Turning to the present case, the Court notes that section 126 of Property Act 2009 indeed provides that if a third party disturbs the owner of a certain property without justification the owner can bring an action and seek cessation of the disturbance. Moreover, this action is not susceptible to time-bar, meaning that the applicants can still make use of it (see paragraph 15 above). Since the mere existence of doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Akdivar and Others,* cited above, § 71) and given that there is no evidence in the case file that the applicants made use of this remedy, the Court considers that these complaints must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

53. The applicants claimed 59,825 euros (EUR) in respect of pecuniary damage, EUR 1 in respect of non-pecuniary damage, and EUR 4,315 for costs and expenses, after the expiry of the time-limit for submitting Article 41 claims.

54. The Government contested the applicants' claim as unfounded.

55. In the Court's letter of 2 May 2016 the applicants were invited to submit any claims for just satisfaction within the time-limit fixed for the submission of their observations on the merits, and were reminded that failure to do so would entail the consequence that the Chamber would either make no award of just satisfaction or else would reject the claim in part. They were also informed that this applied even if they had indicated their wishes in this respect at an earlier stage of the proceedings.

56. The applicants submitted a just satisfaction claim after the expiry of the respective time-limit. They have advanced no reasons for having failed to comply with the requirements of Rule 60 § 2 of the Rules of the Court. In these circumstances the Court considers that their claim should be rejected,

there being no exceptional circumstances which would require it to adopt a different approach in this case (see, *a contrario*, *Nagmetov v. Russia* [GC], no. 35589/08, § 92, 30 March 2017).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the fairness of the civil proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Rejects* the applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 November 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Işıl Karakaş
Registrar	President